



“We’ve Received A PAGA Notice – Now What?” An Employer’s 10-Step Guide

Insights

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If you’ve received a PAGA notice, you can count yourself as one of several thousands of California employers who receive one every year. In fact, 2018 saw a record number of PAGA claims—over 5,700, a 15 percent jump from 2017—filed with the Labor and Workforce Development Agency. The steadily increasing number can be explained by three characteristics unique to PAGA actions: the absence of class certification requirements, that they are not arbitrable, and cannot be waived. The astronomical potential penalties attached to PAGA actions also helps fuel these types of representative actions. Luckily, there is a 10-step process you can take if you receive such a notice to put your organization in the best possible position.

What Is A PAGA Claim?

Dubbed the “bounty hunter law,” PAGA, or the Labor Code Private Attorneys General Act of 2004, is actually a series of statutes codified in Sections 2698 through 2699.6 of the California Labor Code that “authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations.” The employee suing under PAGA acts “as the proxy or agent” of California’s labor law enforcement agency, the Labor and Workforce Development Agency (LWDA), in policing Labor Code violations.

In simpler terms, PAGA confers a private right of action to individuals to prosecute Labor Code violations. PAGA incentivizes this type of lawsuit by authorizing the aggrieved employee to keep 25 percent of any civil penalties collected, while 75 percent goes to the state (Cal. Lab. Code § 2699(f)).

Before filing a PAGA action, the aggrieved employee must exhaust specific administrative requirements by filing a written notice “of the specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation,” both online with the LWDA and by certified mail to the employer (Cal. Lab. Code § 2699.3(a)(1)(A)).

Civil penalties under PAGA can be eye-popping. For Labor Code provisions that do not specify the penalty amount, PAGA provides default civil penalties at \$100 for every employee for every pay period for the first violation, and \$200 for each violation thereafter (though case law may provide an argument that PAGA penalties are limited to violations that occur after the PAGA notice). Because separate penalties may be assessed for each Labor Code violation in the same pay period for the same underlying violation, the PAGA penalty exposure for the client can grow exponentially. For example, 10 employees each with 24 pay periods with a meal and rest period violation in each pay

period translates to nearly \$95,000 of PAGA exposure. The exposure will be doubled for an employer who pays its employees on a weekly basis.

What Should You Do After Receiving A PAGA Notice? A 10-Step Guide

Here is a 10-step process you can take after receiving a PAGA notice to ensure your organization is as well-positioned as possible to minimize or avoid liability.

1. 1. Contact Labor And Employment Counsel

A PAGA notice should immediately prompt you to contact your labor and employment counsel, experienced in handling PAGA actions. There are time limits to cure discreet Labor Code violations, more fully discussed below.

2. Audit Wage Statements

You should review wage statements going back one year from the date of the PAGA notice for compliance with the requirements under Labor Code section 226(a), ensuring they provide: gross wages earned; total hours worked; the number of piece-rate units earned and the applicable piece rate if the employee is paid on a piece-rate basis; all deductions; net wages earned; start and end dates of the pay period; the name of the employee and the last four digits of their social security number or an employee ID number; the name and address of the employing legal entity; and all applicable hourly rates and the corresponding hours worked at each hourly rate. It is worth noting that the time period for which penalties can be assessed is limited to one year before the date of filing of the PAGA lawsuit, not the date of the PAGA notice.

3. Make Necessary Corrections

If you identify problems, you should immediately correct any missing or inaccurate information on the wage statements. Because Labor Code section 226 violations carry the heaviest penalty amount at \$250 for the initial violation and \$1,000 for subsequent violations, correcting the wage statements soon after the PAGA notice will allow you to argue that there are only a few subsequent violations for which penalties may be assessed, if at all.

4. Determine If A “Cure” Is Warranted

The Labor Code allows you to “cure” two types of wage statement violations: (1) failure to include either the start or end date of the pay period (Cal. Lab. Code § 226(a)(6)); and (2) failure to provide the name and address of the employing legal entity (§ 226(a)(8)). Where such requisite information is missing from the wage statements, you should strongly consider undertaking the cure option, as there are few viable defenses to such violations. Where such requisite information is inaccurate on the wage statements, you should weigh the cost and benefit of the cure option with your counsel. For example, use of an employer’s unexpired fictitious business name that is properly recorded in California has recently been validated.

validated.

Undertaking the cure option is no small feat. Specifically, corrected and “fully compliant” wage statements must be provided to every employee for every pay period going back three years from the date of the PAGA notice (Cal. Lab. Code § 2699(d)). The requirement for “fully compliant” corrected wage statements should be interpreted to mean wage statements that comply with all nine requirements set forth in Labor Code section 226(a). You must also file a notice of the cure that includes a “description of actions taken” with the LWDA (§ 2699.3(c)(2), (A)). You have 33 days from the postmark date of the notice to complete the cure. If the wage statement violations have been cured, the law bars the employee from bringing a civil action pursuant to Section 2699 against you.

5. **Audit Timekeeping And Payroll Records And Practices**

You should also audit your time and wage records to flag potentially troublesome practices, including:

- Do you use a rounding policy?
- Do you automatically deduct time for a meal period?
- Have you ever paid a meal or rest period premium?
- Are employees allowed to leave the premises during meal and rest breaks?
- Are employees paid at their regular rate of pay for overtime?
- Have you strictly complied with requirements if adopting an alternative workweek schedule?
- Do you maintain or cover the cost of maintaining uniforms?

This is not an exhaustive list of the potential wage and hour violations, but you and your counsel should audit your records and identify practices and policies that may give rise to Labor Code violations.

6. **Determine If The Employee Is Aggrieved**

An employee may seek civil penalties under PAGA on behalf of themselves and other current or former employees so long as they have suffered at least one alleged Labor Code violation. Although this appears to be a low threshold, the applicable statute of limitations as to each claim should be analyzed by counsel. For example, an employee who went on disability leave more than a year before the date of the PAGA lawsuit would not have worked within the past year that would serve as the basis for any meal and rest violations.

7. **File A Brief Employer’s Response With The LWDA, If Desired**

Although you are not required to file a response addressing the charges in the PAGA notice, standard practice for many counsel is to file a written response with the LWDA. The response should be kept brief without going into any details about any expired statute of limitations or

how the alleged facts and theories are deficient. It is sufficient to say that the PAGA notice fails to identify sufficient facts to allow either LWDA or you to conduct an investigation.

8. Gather Counterintelligence

Because PAGA actions are generally a product of a copious amount of information that has been amassed by the employee's counsel prior to providing the PAGA notice, you should also use counterinvestigative strategies, such as encouraging employees to report any outside contact inquiring about working conditions, or wage and hour matters. Your investigation should include review of the employee's social media accounts, as well as a comprehensive search of social media for advertising referencing the employee or your organization. This is particularly essential for companies with large workforces, as social media advertisements carry the potential to reach the widest audience.

9. Review The Employee' Personnel File

Your call to action is often triggered before you even receive a PAGA notice. In most cases, the employee's counsel will send you a request for the employee's personnel file long before any notice is filed with the LWDA. You should consult a seasoned labor and employment counsel to flag potential wage and hour violations and develop a game plan prior to receiving the inevitable PAGA notice.

10. Assess Early Settlement

Settlement trends in 2018 for combined class and PAGA actions show that the cost of buying peace increases as the case progresses. A PAGA-only action without class action component will often be turned into a hybrid class/PAGA action for settlement purposes. Indeed, it makes most sense for employers to obtain the broadest release possible, since the PAGA claims will be based on wage and hour violations that trigger class damages separate from PAGA penalties.

The average amount of settlements tends to hold steady until 2.5 years after commencement of the lawsuit, after which point the average cost of settlement quickly escalates. This trend reflects the realities of litigation, in that the parties, after 2.5 years of formal litigation, are likely to have invested significant time and money into the case, and are thereby less willing to compromise their position for settlement. Depending on the type and extent of the wage and hour violations, some claims should be litigated, while others are better left tabled. An experienced PAGA practitioner should be able to chart the best course of action and guide you through the legal terrain.

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